

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK A. TANNER,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

Nos. 210906; 210907

Oakland Circuit Court

LC Nos. 97-155575-FC;

97-155576-FC

Before: Bandstra, C.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

In Docket No. 210906, defendant was convicted, following a jury trial, of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1); MSA 28.788(2)(1), and first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). Following a separate jury trial, defendant was convicted in Docket No. 210907 of carjacking, MCL 750.529a; MSA 28.797(a). He was sentenced to concurrent terms of fifteen to thirty years' imprisonment for the CSC I conviction, twelve and one-half to twenty years' imprisonment for the home invasion conviction, and fifteen to thirty years' imprisonment for the carjacking conviction. He appeals as of right. We affirm.

Defendant's convictions in Docket No. 210906 stem from an incident that occurred in the trailer park where defendant lived. According to the victim, a minor at the time of the assault, she met defendant one week before the assault when defendant helped the girl enter her trailer after she had locked herself out. On the night when the assault occurred, defendant entered the victim's trailer by crawling through the victim's bedroom window. During the forcible rape, defendant repeatedly threatened to harm the girl if she cried out.

The carjacking in Docket No. 210907 took place approximately two weeks before the assault in Docket No. 210906. The victim was a sixteen year old boy. Defendant asked the boy if he could give defendant and defendant's male companion a ride back to the aforementioned trailer park. The victim agreed because the trailer park was nearby. After directing the victim to drive to a relatively isolated area, defendant dragged the victim by his neck from the car and struck him twice in the face. There was also testimony from defendant's companion that defendant would have attempted to run the victim over had the companion not prevented it.

Defendant argues that the trial court abused its discretion in imposing a fifteen-year minimum sentence for both the CSC I and carjacking convictions. We disagree. We review a defendant's sentence for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). "A sentence constitutes an abuse of discretion if the sentence violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Defendant asserts that the trial court abused its discretion by exceeding the sentencing guidelines' recommended minimum sentence range of five to ten years for the CSC 1 conviction.¹ We disagree. A court may depart from the guidelines when, in its judgment, the recommended range under the guidelines is disproportionate to the seriousness of the crime. *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). However, departures from the judicial guidelines should alert appellate courts to the possibility of a violation of the principle of proportionality. *Id.* at 659-660. "The crucial test is not whether the sentence departs from, or adheres to, the recommended range under the guidelines, but whether it reflects the seriousness of the matter." *People v Castillo*, 230 Mich App 442, 447-448; 584 NW2d 606 (1998). A court upwardly departing from the sentencing guidelines must provide its reasons for doing so at the time of sentencing. *People v Fleming*, 428 Mich 408, 417; 410 NW2d 266 (1987).

After reviewing the record, we conclude that "the trial court properly considered the nature of the crime in a way not fully addressed in the guidelines" when sentencing defendant for the CSC I conviction. *Castillo, supra* at 449. For example, the trial court properly considered defendant's complete lack of remorse, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), and the impact of defendant's crime on the victim, *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998). Additionally, deferring to the trial court's superior ability to assess the credibility of witnesses, *People v Ahumada*, 222 Mich App 612, 617; 564 NW2d 188 (1997), we believe there is ample support in the record for the trial court's conclusion that defendant perjured himself. *People v Syakovich*, 182 Mich App 85, 90-91; 452 NW2d 211 (1989). As the trial court correctly noted, this circumstance, coupled with defendant's lack of remorse, reflected badly on defendant's potential for rehabilitation. *Id.* at 91. Further, we reject defendant's claim that the sentence is an abuse of discretion because the victim's testimony was, in defendant's opinion, questionable. Given defendant's conviction, it is evident that the jury found the victim quite credible. We will not interfere with the jury's role in determining the credibility of witnesses. *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Accordingly, we see no abuse of discretion.

We also reject defendant's contention that his carjacking sentence violates the principle of proportionality. The crime of carjacking carries a possible life sentence. MCL 750.529a; MSA 28.797(a). As previously mentioned, the record shows that after directing the young victim to drive to a relatively isolated area, defendant dragged the boy by his neck from the car and struck him twice in the face. There was also testimony that defendant would have tried to run the victim over had defendant not been stopped by his companion. Furthermore, at the time defendant committed the instant offense, he was on probation as a result of being placed on youthful trainee status under the Holmes Youthful

Training Act² in two different cases. He was also awaiting sentencing in another case for first-degree home invasion and aggravated assault, MCL 750.81a; MSA 28.276(1). Under these circumstances, we are satisfied that defendant's carjacking sentence reflects the nature and severity of the crime, *People v Houston*, 448 Mich 312, 319; 532 NW2d 508 (1995), and does not constitute an abuse of discretion. *Milbourn, supra*.³

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

¹ Defendant's sentences are reviewed under the 1988 Michigan Sentencing Guidelines. The crimes of home invasion and carjacking convictions are not included in those sentencing guidelines. Michigan Sentencing Guidelines (2d ed, 1988); *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996).

² MCL 762.11 *et seq.*; MSA 28.853(11) *et seq.*

³ In his argument in his brief on appeal, defendant also challenges the proportionality of his sentence for his first-degree home invasion conviction. Defendant argues that a proportionate sentence can be determined by adjusting his proposed guideline score for the crime of breaking and entering of an occupied dwelling by the percentage increase of the statutory maximum sentence under MCL 750.110; MSA 28.305, prior to its amendment in 1994 (i.e., fifteen years), to the statutory maximum for first-degree home invasion (i.e., twenty years). However, because defendant's statement of the question presented focuses solely on the fifteen year minimum terms imposed for the CSC I and carjacking convictions, review of his home invasion sentence is inappropriate. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 634; 567 NW2d 468 (1997). Further, defendant has failed to cite any authority to support his position. *People v Hill*, 221 Mich App 391, 397 n 2; 561 NW2d 862 (1997). In any event, we are unpersuaded by defendant's argument. See *People v St. John*, 230 Mich App 644, 649; 585 NW2d 849 (1998).